

Submission  
No 96

## INQUIRY INTO CHILD PROTECTION

**Organisation:** The Law Society of New South Wales

**Date received:** 01 August 2016

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THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: IIC/FLC:GUak:1183737

1 August 2016

The Hon Greg Donnelly MLC  
Chair, General Purpose Standing Committee No.2  
Legislative Council  
Parliament House  
Macquarie Street  
Sydney NSW 2000

By email:

Dear Mr Donnelly,

**Inquiry into child protection**

Thank you for the opportunity to provide comments to the inquiry into child protection (“Inquiry”).

The Law Society of NSW notes that while there is no specific reference to relevant legal frameworks in the terms of reference, it may be beneficial for the Inquiry to include an examination of relevant legal frameworks in the NSW child protection system.

Law Society members have experience in providing legal services in relation to child protection litigation. Law Society members have observed that some child protection matters currently before the Children’s Court of NSW may be suitable for determination by the Federal Family Law Courts. However, there are currently delays of around two to three years in the Family Court and Federal Circuit Courts in relation to parenting matters. The extent of these delays is an access to justice issue, given that families are unable to access the family court system due to the extent of these delays.

The Law Society notes that the Family Law Council has recently examined the intersection of the child protection and family law systems.<sup>1</sup> The focus of this reference was on families with complex needs and the intersection of the family law and child protection systems. In particular, many families seeking to resolve their parenting disputes have complex needs, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. These disputes may be able to be better addressed with the assistance of relationship support services and/or court processes that can cut across the child care and

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<sup>1</sup> See:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCounciltermsofreference.aspx>

protection and family law systems. The Law Society provided submissions to this reference, which may be of interest to this inquiry.<sup>2</sup>

The Law Society also notes that the Royal Commission into Institutional Responses to Child Sexual Abuse continues to conduct a number in-depth case studies into particular institutions. The Law Society made a submission to the Royal Commission's Consultation Paper: Institutional responses to child sexual abuse in out of home care, which focused on the experience of Aboriginal children and families in NSW.<sup>3</sup> It is anticipated that a number of the Royal Commission's recommendations may refer to child protection systems and identify areas for reform. The Law Society considers that the Royal Commission's findings and recommendations may be of particular relevance to this Inquiry.

The Law Society provides the following specific comments relevant to term of reference (g) and (i) of the Inquiry.

### **Current issues for Indigenous children and families in the care and protection jurisdiction**

The Law Society notes that Aboriginal and Torres Strait Islander children were the subject of a child protection substantiation at eight times the rate of non-Indigenous children in 2012-2013.<sup>4</sup> According to the Australian Institute of Health and Welfare ("AIHW"), Aboriginal and Torres Strait Islander children are represented in out-of-home care at ten times the rate of non-Indigenous children across Australia.<sup>5</sup> According to the AIHW:

At 30 June 2013, there were 13,952 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 57.1 per 1,000 children. These rates ranged from 22.2 per 1,000 in the Northern Territory to 85.5 per 1,000 in New South Wales...Nationally, the rate of Indigenous children in out-of-home care was 10.6 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than for non-Indigenous children, with rate ratios ranging from 3.9 in Tasmania to 16.1 in Western Australia.<sup>6</sup>

Further, "[t]he rate of Aboriginal and Torres Strait Islander children placed in out-of-home care has steadily increased since 2009, from 44.8 to 57.1 per 1,000 children."<sup>7</sup>

Given this over-representation, the Law Society's comments are informed by the desire to secure better outcomes for Indigenous children and families.

<sup>2</sup> Law Society of NSW, *Submission to Family Law Council Reference – Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (August 2015), <<http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1044586.pdf>> and Law Society of NSW, *Submission to Family Law Council Reference – Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (October 2015)

<http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1057861.pdf>.

<sup>3</sup> Law Society of NSW, *Submission to Consultation Paper: Institutional responses to child sexual abuse in out of home care* (May 2016)

<http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1139498.pdf>.

<sup>4</sup> AIHW, *Child Protection Australia 2012-13*, at 25 available at:

<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164> (accessed on 22 October 2014)

<sup>5</sup> Cited in Judy Cashmore, 'Children in the out-of-home care system', in *Families, policy and the law: Selected essays on contemporary issues for Australia*, Alan Hayes and Daryl Higgins, (eds), AIFS <http://www.aifs.gov.au/institute/pubs/fpl/fpl15.html>

<sup>6</sup> Law Society of NSW, *Submission to Family Law Council Reference – Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (August 2015), 51.

<sup>7</sup> *Ibid.*

The Law Society notes that there are children in unsafe situations where their removal is warranted. However, in the Law Society's experience, children may be unnecessarily removed from family and kin through a combination of factors that can adversely affect the outcomes for both Indigenous children and their families when proceedings are brought in the Children's Court. These issues are explained in more detail below.

### **Low levels of trust and engagement between Indigenous people and the Department of Family and Community Services**

The Law Society considers that early intervention and engagement is a strategy that would likely address some of the drivers leading to the removal of Indigenous children. The Law Society notes that meaningful and collaborative early intervention and engagement would require measures such as the closer involvement of Indigenous service providers (and not just services identified as out-of-home care providers); better use of care and safety plans; and the availability of legal representation at earlier stages, such as in relation to parental responsibility contracts.

However, the Law Society understands that there is a historical distrust between Indigenous people and the NSW Department of Family and Community Services ("FACS"). The Law Society considers that this distrust may result in sub-optimal consequences for process and outcome. For example, once FACS has intervened, parents may not nominate other kin or family members who may be suitable carers due to overwhelming issues of shame involved. The Law Society notes further that in some instances, the fear of FACS also makes family members reluctant to nominate as carers as there are concerns that FACS might become involved in their own family if something were to happen while a family member's child is in their care.

Further, the Law Society notes that there is a potential for conflict with FACS being the investigative and removal body, as well as the key (and for some services, the only) referrer to therapeutic services. This is not unique to FACS or NSW but is consistent with the type of child and family welfare systems that have developed in each of the Australian states and territories. Australian child and family welfare systems are identified as child protection systems.<sup>8</sup> Key characteristics of how child protection systems address child protection can be seen in the table below:

| <b>CHARACTERISTIC</b>                                  | <b>CHILD PROTECTION SYSTEM</b>  |
|--|---|
| Framing the problem of child abuse                     | The need to protect child from harm   |
| Entry to services                                      | Single entry point; report or notification by third party                               |
| Basis of government intervention and services provided | Legalistic, investigatory in order to formulate child safety plans                      |
| Place of services                                      | Separated from family support services  |
| Coverage   | Resources are concentrated on families where risks of (re-)abuse are high and immediate |
| Service approach                                       | Standardised procedures; rigid timelines  |

<sup>8</sup> Other countries with child protection systems are the UK, US and Canada. These types of child and family welfare systems differ from those identified as 'family service' and 'community caring' systems of child and family welfare (See Nancy Freymond and Gary Cameron, 2006, *Towards Positive Systems of Child and Family Welfare: International Comparisons of Child Protection, Family Service and Community Caring Systems*, University of Toronto Press). These other types of child and family welfare systems apply different approaches to the characteristics outlined in Table one on this page.



|                           |                                     |
|---------------------------|-------------------------------------|
| State-parent relationship | Adversarial                         |
| Role of the legal system  | Adversarial; formal; evidence-based |
| Out-of-home care          | Mainly involuntary                  |

Table 1. Characteristics of the 'child protection' orientation to child protection<sup>9</sup>

The Law Society considers that this arrangement will not address the low levels of engagement with early intervention services. To provide a further example, the Law Society notes that useful and effective early intervention schemes exist. However, access to these programs for Indigenous families is restricted in a number of ways.

In the Law Society's experience, FACS will generally not make a referral to an early intervention service until children have already been removed. The Law Society considers that this approach is counter-intuitive on a number of levels. Referrals should be made to therapeutic, early intervention programs before removal in order to prevent removal. Further, given the historical relationship of distrust between Indigenous people and FACS, the effectiveness of this service is significantly reduced by removing the ability of Indigenous -community controlled organisations to make referrals.

### **Local community participation in decision-making**

The Law Society acknowledges the development of the FACS '*Guiding principles for strengthening the participation of local Aboriginal community in child protection decision making*',<sup>10</sup> which occurred in consultation with the Grandmothers Against Removals (GMAR) and the NSW Ombudsman. The document creates a set of guiding principles for FACS and local Indigenous communities to work together in the practical application of the *Children and Young Persons (Care and Protection) Act 1998* ("CYPCP Act") and the relevant care and protection policies.

The document also notes that FACS has committed to reviewing and improving its practices and engagement with local Indigenous communities to achieve outcomes that are in the best interests of Indigenous children and young people, as well as their families. Importantly, the FACS *Aboriginal Cultural Inclusion Framework* facilitates the establishment of local engagement arrangements with Indigenous communities to inform priorities and strategic actions in their Aboriginal Cultural Inclusion Plan.<sup>11</sup>

The Law Society encourages ongoing engagement with local Indigenous communities to ensure Indigenous community participation in the decision making regarding the care and protection of Indigenous children, as envisaged under the CYPCP Act.

### **Family law early intervention - early referral to Indigenous services**

The Law Society notes that s 12 of the CYPCP Act provides:

<sup>9</sup> Table adapted from Rhys Price Robertson, Leah Bromfield and Alistar Lamont, 2014, 'International approaches to child protection. What can Australia Learn?', CFCA Paper No. 23, p.4 <https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca-paper23.pdf>, last accessed 15 May 2015.

<sup>10</sup> NSW Department of Family and Community Services, *Guiding principles for strengthening the participation of local Aboriginal community in child protection decision making* (November 2015) [http://www.facs.nsw.gov.au/data/assets/file/0003/373233/gmar\\_facs\\_guiding\\_principles\\_Nov2015.pdf](http://www.facs.nsw.gov.au/data/assets/file/0003/373233/gmar_facs_guiding_principles_Nov2015.pdf)

<sup>11</sup> Department of Family and Community Services, *Aboriginal Cultural Inclusion Framework 2015-2018*, <[http://www.sectorconnect.org.au/assets/pdf/resources/Aboriginal\\_Cultural\\_Inclusion\\_Framework\\_2015-2018.pdf](http://www.sectorconnect.org.au/assets/pdf/resources/Aboriginal_Cultural_Inclusion_Framework_2015-2018.pdf)> 3.

Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

Given this, the Law Society notes that Indigenous organisations are entitled to be involved with the FACS decision making process at an early stage. In the Law Society's view, there is significant potential for reducing the numbers of Indigenous children entering the out-of-home-care system if Indigenous-controlled services were more involved with the FACS decision making process at an early stage. This would contribute to FACS' understanding of how it could meet the needs of Indigenous families better (for example, by connecting with trauma or mental health services), thereby preventing removal, or providing for meaningful pathways to restoration. In the Law Society's experience, most Indigenous community organisations are unaware of this legislative entitlement, and therefore their involvement has been limited.

The Law Society notes that this would require building the capacity of Indigenous organisations through education, to highlight to these organisations the potential significance of their impact, and the scope of their influence. Further, if these organisations were provided with community legal education to understand the difference in the care and family law jurisdictions, they would be better placed to identify matters appropriate for referral to the family law jurisdiction; which can result in better outcomes for Indigenous families.

Facilitating the greater engagement by FACS with Indigenous organisations does not necessitate that those organisations be brought under the out-of-home-care umbrella. There may be an advantage in having Indigenous organisations independent of FACS in the process.

Anecdotal evidence also suggests that FACS has in some cases had a list of preferred providers for therapeutic services, which is inconsistent, ad hoc and often not communicated to the families involved in the process. This means that specialised services attended by families, such as services provided by Indigenous community organisations as mentioned above, may not be recognised by FACS as a 'preferred provider'. Law Society members have experienced ongoing issues with FACS often not recognising a parent's interaction with service providers that FACS does not fund or endorse. This can have significant repercussions for the family, particularly if care arrangements are contingent on a parent's attendance at a particular therapeutic service.

As noted above, there is a historical relationship of distrust between Indigenous people and FACS, and its associated agencies. This will be difficult to resolve, and in the Law Society's view, better outcomes for Indigenous people will result if they are serviced by agencies outside of FACS. Funding Indigenous services to operate as out-of-home-care providers may create divisive mistrust in Indigenous communities.

In the Law Society's view, there should be more Indigenous-specific services available particularly at the early intervention stage, and more pathways to engagement with therapeutic services without the involvement of FACS. Indigenous parents and families should be connected with Indigenous-controlled organisations, or organisations that are partnered with Indigenous-controlled organisations. Indigenous parents should be supported by an intensive case management approach, and in order to avoid a repeating process, the focus of the services must be focused on trauma and healing.



## Use of Parental Responsibility Contracts

The Law Society notes that the CYPCP Act was amended in October 2014 to change the operation of Parental Responsibility Contracts (PRC). PRCs aim to improve parenting skills and encourage parents to accept greater responsibility for the care of their child. However, the Law Society understands that PRCs are being under-utilised, and are rarely registered by the Children's Court, as is currently required. The Law Society supports greater use of PRCs in appropriate cases, which can be used effectively as an early intervention tool to secure better outcomes for Indigenous families.

## Aboriginal cultural contact plans

While the Law Society's primary focus remains the safety and best interests of children, the Law Society submits that maintaining family and cultural connection must be part of the consideration of whether an action is in fact in the best interests of the child.

The Law Society notes that a principle underpinning the Wood Inquiry was that:

All Aboriginal children and young people in out-of-home care should be connected to their family and their community, while addressing their social, emotional and cultural needs.<sup>12</sup>

Taking into account the experience of Law Society practitioners, cultural connection is vital for an Indigenous child's resilience. The Law Society holds the strong view that cultural contact plans should be made as part of court-ordered arrangements, and children should have meaningful contact with their families, and families from their own Indigenous nations. The Law Society notes that some out-of-home-care providers recruit Indigenous people to run internal "cultural contact programs." In the Law Society's view, this arrangement is neither culturally safe nor sufficient as culture is nurtured within culturally appropriate, lived experiences.

Cultural contact must be provided for a significant and substantial time with the purpose of establishing a meaningful relationship with parents, family and community; beyond the establishment of identification. The Law Society notes that structured and positive engagement can assist to establish a positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives and something they should feel proud of.

Children have a right to enjoy their own culture and to use their own language (Article 27, *International Covenant on Civil and Political Rights*,<sup>13</sup> and Article 30, *Convention on the Rights of the Child*).<sup>14</sup>

The Law Society notes further that the 1997 *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*<sup>15</sup> (the

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<sup>12</sup> James Wood, 2009, *Report of the Special Commission of Inquiry into child protection services in NSW*, NSW Department of Premier and Cabinet, at v, available online: <http://apo.org.au/node/2851> (accessed 5 November 2014).

<sup>13</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

<sup>14</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990).

<sup>15</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997). "Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" available online:

“Bringing them Home Report”) recommended that there be national standards set in state and territory legislation, which included the factors to be considered in determining the best interests of an Indigenous child.

The Bringing them Home Report recommended that national standards legislation provide that the initial presumption is that the best interest of the child is to remain within his or her Indigenous family, community and culture (recommendation 46a). Further, recommendation 46b provided that in determining the best interests of an Indigenous child, the decision maker must also consider:

1. The need of the child to maintain contact with his or her Indigenous family, community and culture,
2. The significance of the child’s Indigenous heritage for his or her future well-being,
3. The views of the child and his or her family, and
4. The advice of the appropriate accredited Indigenous organisation.

The Law Society considers that it should be within the power of the Children’s Court to make contact orders that provide for contact that is commensurate with risk, and to provide for contact with the purpose of establishing a meaningful relationship with parents and family; beyond the establishment of identification. The Law Society notes that structured and positive engagement can assist in establishing positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives. As noted above, while safety is the primary consideration, the best interests analysis includes the right to culture and family.

At a minimum, the Law Society submits that FACS should prepare written contact plans that provide a high level of specificity. Structured contact plans, reinforced by orders, are necessary for “difficult” parents in high conflict situations. The Law Society notes that these contact plans should be regularly communicated and re-negotiated.

The Law Society’s view also is that contact plans for Indigenous children should specifically contemplate and make orders that provide for cultural contact. If cultural contact plans are part of the court orders, FACS will be obliged to implement these orders. The Law Society submits that it is open to the Children’s Court to create specific policy to ensure that cultural contact plans are part of the care plan. For example, the Children’s Court President could promulgate a Practice Note requiring that care plans for Indigenous children be accompanied by cultural contact plans that are capable of establishing meaningful relationships with the child’s parents, family and/or nation. The Law Society notes that if cultural contact plans are court-ordered, there will be a positive obligation on FACS to identify family members who can fulfil that cultural role. The Law Society also notes that non-Indigenous parents are often given supervised contact outside of FACS offices.

In this regard, the Law Society notes that there is much scope for meaningful cultural contact plans. For example, even though a parent may not have capacity for full parental responsibility, there may still be a range of ways in which they can have meaningful contact.

Further, the Law Society proposes consideration of a system of guardianship or foster care similar to open adoptions. Under this proposed model, contact plans would include acknowledgement of the child’s cultural heritage such as the child’s family of origin and nation. Further, there would be court-ordered arrangements for

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[http://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf) (accessed 24 February 2015).



cultural contact and parents would be able to secure more meaningful contact with their children in out-of-home-care.

The Law Society submits that the level of contact available to parents should be commensurate with the risk. If, for example, the parents' issues leading to the removal of the child are mental health issues and, for example, they have psychotic episodes every three to four years, then a child should be able to see his/her parents when the parents are well.

In the Law Society's view, parents are more likely to accept having their children in out-of-home-care if contact is commensurate with the reasons why the removal took place. The Law Society suggests that if FACS has built strong networks with Indigenous organisations, appropriate matters could be referred through these organisations to the family courts by Indigenous organisations; and be appropriately resourced to provide support for these families.

It is also common for children in care to have minimal contact with families, where such families are not permitted to know where their children live, where they go to school, or what extracurricular activities the children are involved in.

If it is the case that the children's best interests are served by remaining in their out-of-home-care placements, the Law Society considers that parents should be able to move to a more natural parental relationship with their children. Siblings should also have the benefit of being raised knowing each other as siblings and having a more natural family relationship. This is consistent with the current practices of matters dealt with in the family law system.

In such cases, the Law Society submits that consideration should be given to the following types of arrangements:

- Unsupervised contact on weekends and holidays and in a manner that is in the child's best interests.
- Capacity to attend events and functions at the child's schools.
- Capacity to attend and participate with children in extracurricular activities.
- Shared parental responsibility between parents and care givers, particularly kinship carers. Any sharing of parental responsibility would need to be carefully assessed and any decisions should be based on the parties' capacity to work cooperatively with each other.

The Law Society submits that in such complex matters where the care and protection system does not allow for the natural renewal of a relationship between a parent and a child, such issues continue to exacerbate the current crisis of placement breakdown, particularly when the children become adolescents. The Law Society considers that a greater emphasis on retention of natural family relationships would help to ease this transition period.

### **Improved information sharing between relevant agencies**

Effective information flows are vital between the relevant child protection authority and the various agencies involved in child protection. This is particularly true in respect of information sharing between the child protection authority and Indigenous community controlled agencies, given the overrepresentation of Indigenous children and families in this jurisdiction. Given that the child protection authorities and the various service providers are all concerned with achieving outcomes that are in the best interests of the child, such information flows should be multi-directional and

reciprocal. We note these views are consistent with the views stated in the Royal Commission Consultation Paper, that:

Child safe organisations observe Article 18 of [the UN Convention on the Rights of the Child], which states that parents, carers, or significant others with caring responsibilities have primary responsibility for the upbringing and development of the child in their care. This includes being informed about the organisation's operations and the child's progress, and being involved in decisions affecting the child.<sup>16</sup>

Notwithstanding the provisions of Chapter 16A of the CYPCP Act, the Law Society has been informed by a number of Indigenous service providers<sup>17</sup> that in practice in NSW, it can sometimes be difficult to obtain information from FACS. One example related to the Law Society is the difficulty encountered by an Indigenous community controlled organisation in relation to simply obtaining a copy of FACS' guidelines in relation to contact.

The Law Society considers that it would assist with better management of placements in out-of-home-care if FACS and service providers have shared expectations. The Law Society is advised by legal and non-legal service providers that if FACS has a view that there is a real chance of restoration of the child to his or her parents, then they will direct their efforts accordingly. However, if service providers are aware that FACS does not consider that there is any real chance of restoration, then service providers will adopt a different approach, including in relation to working with the child's extended family and kin in respect of parental responsibility and/or contact.

Another example provided by an Indigenous service provider of better outcomes that can be gained by effective information sharing, is in the situation where FACS has concerns about a person being supported by a service provider (for example, to make a joinder application for parental responsibility, or some aspect of parental responsibility). If FACS has information that suggests that there are concerns about whether that person would, in fact, be a safe carer, such information should be provided to that service provider (with the appropriate caveats in respect of the reliability of the information). As noted by another Indigenous service provider, "if Indigenous service providers do not have enough information, we might be helping to perpetuate the hurt."

We note that the Consultation Paper recognises that the Senate Community Affairs References Committee's Inquiry into out-of-home-care identified that "one of the key challenges for [Indigenous] families with children in care is the need to establish positive and constructive relationships with child protection authorities."<sup>18</sup>

We submit that an approach that prioritises information sharing with Indigenous support services, particularly in respect of FACS' expectations in respect of the child's placement, would likely be a better use of the resources of FACS and of both legal and non-legal service providers. Indigenous service providers are often best placed to identify safe and appropriate adults in a particular child's family and community, as well as other protective factors for that child.

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<sup>16</sup> Royal Commission into institutional responses to child sexual abuse in out of home care: Consultation Paper, 86-87.

<sup>17</sup> This includes feedback from Aboriginal government staff, and staff of non-government Aboriginal community controlled services.

<sup>18</sup> Royal Commission into institutional responses to child sexual abuse in out of home care: Consultation Paper, 87

Better information exchange, which appears to require a shift in FACS practice (whether on an institutional level, or at a caseworker level, or both), is likely to improve both (1) outcomes for the child; and (2) the relationship between FACS and the Indigenous community, which has long been fraught with historical distrust.

### **Use of Legal Aid NSW's Care Alternative Dispute Resolution Program**

The Law Society notes that Legal Aid NSW has established a new Care Alternative Dispute Resolution Program for parties seeking contact after final orders have been made, or seeking to vary a contact order.

The model is non-litigation focused, and invites parties to come to an agreement about arrangements for children. There is a focus on ensuring the voices of the children will be heard in these matters. To this end Legal Aid provides representation for all children who are subject of the contact dispute. Legal assistance will also be available for parties attending subject to means testing and a "significant disadvantage" test.

The Law Society considers that this program offers the potential for establishing detailed contact arrangements and cultural contact, which would ideally be expressed as appropriate orders. The benefit of this program may be the flexibility to revisit contact orders as the child gets older and as parents develop greater parenting capacity.

### **Working With Children Checks**

The Law Society has advocated on a number of issues aimed at improving outcomes for Indigenous children and families in the care and protection jurisdiction. We consider this a matter of some urgency, given the serious over-representation of Indigenous children and families in the care and protection system.

The Law Society is particularly concerned about the operation of the Working With Children Check ("WWCC") requirements in relation to Indigenous carers. The Law Society notes the exemption from requiring WWCCs for authorised carers who are close relatives of the child.<sup>19</sup> However, Indigenous carers (and in particular, Indigenous kin in informal care arrangements) are in some circumstances required to obtain a WWCC when caring for a child.

In this regard, the Law Society is concerned about anecdotal reports that potentially suitable Indigenous family carers are not being considered by FACS due to an actual or perceived failure by those potential carers to gain a WWCC. In some cases, this may occur due to historical convictions that do not reflect the current ability of those individuals to care for their family members. If the WWCC process is acting to exclude from consideration safe and suitable Indigenous carers, this may have the unintended consequence of impeding an outcome that would have, in fact, better served the best interests of a particular child.

The Law Society submits that further consideration should be given to the way in which the WWCC requirements operate for Indigenous carers, and also carers in the child protection system more broadly.

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<sup>19</sup> Clause 20(d) Child Protection (Working with Children) Regulation 2013.



We consider that these efforts are likely to assist with improving outcomes for Indigenous children, by keeping them safe within their own families and preserving their cultural identities.

### **Publication of statistics illustrating the link between care jurisdiction and crime**

There is a substantial body of research internationally and within Australia that indicates that there is an association between child maltreatment (abuse and neglect) and various social problems affecting children and young people, such as homelessness, substance abuse and suicide. In particular, there is consistent evidence of a link between child abuse and neglect and later offending and involvement in the juvenile justice system. More importantly, a number of studies point to the importance of timing, and implicate abuse and neglect - particularly neglect and poor supervision that extends into or starts in adolescence - in the development of offending behaviour.<sup>20</sup>

The *Report of the Special Commission of Inquiry into Child Protection Services in New South Wales* found that 28 per cent of males and 39 per cent of females in detention had a history of out-of-home care.<sup>21</sup> In a more recent study, it was found that 34 per cent of the young people appearing before the NSW Children's Court were, or had recently been, in out-of-home care,<sup>22</sup> and that children in care are 68 times more likely to appear in the Children's Court than other children.<sup>23</sup>

This research further illustrated that young people in care are still being charged for relatively minor property damage offences that occur in the care environment, despite the fact they are often residing in homes "engaged by the state to provide professional behaviourist techniques to mitigate the child's allegedly 'challenging' behaviour or psychiatric issues"; and the practice of relying on police and the justice system in lieu of adequate behavioural management is still in use.<sup>24</sup>

This research was also highlighted in a 2011 Legal Aid NSW Issues Paper, which further noted that the above findings reflect the experience of a number of Legal Aid NSW Children's Legal Service clients.<sup>25</sup> Legal Aid conducted a study of the top users of legal aid services between 2005 and 2010, which found that 80 per cent of its high service users are less than 19 years of age and are clients of the Children's Legal Service. Further, one of the most common characteristics of these high service users is a history of out-of-home-care.<sup>26</sup>

The Law Society considers that it is imperative that information on the relationship between children in out of home care and the criminal justice system is publicly available and regularly updated. Regular reporting on the well-established relationships between the care and criminal jurisdictions has the potential to drive cross-government agency cooperation to find workable solutions to these complex issues, to reduce the number of children and young people moving from the out of home care jurisdiction to the criminal jurisdiction.

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<sup>20</sup> Judy Cashmore, 'The link between child maltreatment and adolescent offending: systems neglect of adolescents', [2011] *Family Matters*, 89, 31-41, accessed at < <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>>.

<sup>21</sup> The Hon James Wood, AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, 556.

<sup>22</sup> Katherine McFarlane, "From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System", *Current Issues in Criminal Justice*, 346.

<sup>23</sup> *Ibid*, 346.

<sup>24</sup> *Ibid*, 347.

<sup>25</sup> Erin Gough, *The drift from care to crime: a Legal Aid NSW issues paper*, October 2011, 5.

<sup>26</sup> *Ibid*.

Thank you for the opportunity to provide comments. Any questions can be directed to Anastasia Krivenkova, Principal Policy Lawyer, on \_\_\_\_\_ or by email at \_\_\_\_\_

Yours sincerely,

Gary Ulman  
**President**